HASSAN ABDUL KARIM v. PERDANA MENTERI, TAN SRI DATO' HJ MAHIADDIN MD YASIN & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
EVROL MARIETTE PETERS JC
[JUDICIAL REVIEW NO: JA-25-2-01-2021]
24 MAY 2021

ADMINISTRATIVE LAW: *Judicial review – Leave – Application for – Validity and constitutionality of laws – Yang di-Pertuan Agong made Proclamation of Emergency upon advice of Cabinet presented by Prime Minister – Whether certain provisions of laws surrounding making of Proclamation invalid, unconstitutional, void and of no legal effect – Whether court seized with jurisdiction to hear application – Federal Constitution, arts. 4(1), 121(1) & 150(3), (6), (8) – Emergency (Essential Powers) Ordinance 2021, ss. 11, 14 & 15*

CONSTITUTIONAL LAW: *Legislation – Validity – Yang di-Pertuan Agong made Proclamation of Emergency upon advice of Cabinet presented by Prime Minister – Whether certain provisions of laws surrounding making of Proclamation invalid, unconstitutional, void and of no legal effect – Whether court seized with jurisdiction to hear application – Federal Constitution, arts. 4(1), 121(1) & 150(3), (6), (8) – Emergency (Essential Powers) Ordinance 2021, ss. 11, 14 & 15*

The Yang di-Pertuan Agong ('YDPA') had made a Proclamation of Emergency ('Proclamation'), on 11 January 2021, pursuant to the presentation of the advice of the Cabinet by the Prime Minister. The applicant, a member of the Dewan Rakyat and a member of the State Legislative Assembly of Johor, applied for leave for judicial review against the Prime Minister and the Government of Malaysia ('respondents') seeking (i) declarations that (a) ss. 11, 14 and 15 of the Emergency (Essential Powers) Ordinance 2021 ('Ordinance') published in the Federal Government *Gazette* PU(A) 12/2021 on 14 January 2021 were invalid and unconstitutional and, therefore, void by virtue of their inconsistency with the provisions of the Federal Constitution ('FC'); (b) art. 150(8) of the FC was unconstitutional, and therefore, null and void and of no legal effect, pursuant to being inconsistent with arts. 4(1) and 121(1) of the FC, and as a result, was null and void and of no legal effect. Alternatively, and in any event, that art. 150(8) of the FC did not preclude the court from judicially reviewing the exercise of power under the Ordinance; and (c) the respondents were under a constitutional duty, pursuant to art. 150(3) of the FC to advise the YDPA to summon Parliament for the Proclamation and Ordinance to be laid before both Houses of Parliament for all necessary and appropriate resolutions to be passed in accordance with the mandatory provisions of art. 150(3) of the FC; and (ii) orders of *mandamus*, either directing the respondents to lay the Proclamation and the Ordinance before both Houses of Parliament in

accordance with the mandatory provisions of art. 150(3) of the FC or, alternatively, to advise the YDPA to summon a meeting of Parliament, in accordance with the mandatory provisions of art. 150(3) of the FC. The primary issue that arose for adjudication was whether this court had the jurisdiction with regard to this application.

Held (dismissing application):

(1) The involvement of the AG in this application was proper as his presence was to assist the court in determining if there was any aspect of the case that should render a dismissal of this application. (para 12)

(2) To determine and address whether the court had the jurisdiction with regard to the application, reference was made to art. 150, in particular cl. (6) and (8). Article 150(6) of the FC states that no legislation enacted pursuant to a Proclamation shall be invalid on the ground of inconsistency with the any provision of the FC. Article 150(8) of the FC states that 'no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity …'. The words are explicit enough to exclude even an application for leave for judicial review. Ouster clauses are not *per se* or automatically invalid for being unconstitutional and art. 121 of the FC expressly empowered Parliament to prescribe the extent of limits of the court's powers and jurisdiction. If ousting or restricting judicial review in federal law is not invalid *per se*, *a fortiori*, a provision in the FC which explicitly excludes the jurisdiction of the court is not invalid. In fact, art. 150(8) of the FC appears to provide a double bar to judicial scrutiny, as it prefaced with the words 'Notwithstanding anything in this Constitution', which is indicative that art. 150(8) not only prevails over any other law, it also supersedes any other provision in the FC. As such, art. 150(8) of the FC overrides not only art. 121 but also arts. 43, 44 and 71 as well, provisions which the applicant contended were inconsistent with art. 150 of the FC. (paras 18-22)

(3) The meaning of 'law' in art. 4 is confined to ordinary laws and does not apply to Acts enacted to amend the FC. The rationale for the introduction of cl. 8 into art. 150 of the FC was provided in the explanatory note to the Constitution (Amendment) Bill which was '… to provide that the satisfaction of the Yang di-Pertuan Agong … is final and conclusive and cannot be challenged or called in question in any court or on any ground …'. In light of purpose and intent of cl. 8 of art. 150 of the FC, it was all the more imperative that this application should be dismissed. Since the impediments in cls. (6) and (8) of art. 150 of the FC remained unsurmounted, the court was unable to allow the application as its hands were tied by the FC that is free from any form of social or political consideration. (paras 25, 26, 28 & 32)

A *Obiter:*

(1) A judge is not appointed to subscribe to the views of the *vox populi*. As such, those who feel aggrieved by any legislation, must address themselves to the legislature and not the courts. As aptly expressed by Raja Azlan Shah FJ in *Loh Kooi Choon v Government Of Malaysia*, 'they
B have their remedy at the ballot box'. (para 30)

(2) Much has been said by the applicant about the injustice that would result if the court was to shut the door to this application, which had merely sought leave for judicial review. However, the door is locked by virtue of art. 150(8) of the FC. Even if that door is unlocked, there is no
C guarantee that the court would automatically open it and grant leave. However, at this point in time, the court is not even in possession of the key and, without that key, the inexorable conclusion is that it would be impossible for the court to open the door. (para 33)

D **Case(s) referred to:**

All Basotho Convention (ABC) v. Prime Minister [2020] 4 LRC 466 ***(refd)***
Bavadra v. Attorney General [1988] LRC (Const) 13 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
Eng Keock Cheng v. PP [1965] 1 LNS 36 FC ***(refd)***
Fung Fon Chen & Anor v. The Government Of Malaysia & Anor [2012] 8 CLJ 706 HC ***(refd)***
E *George John v. Goh Eng Wah Bros Filem Sdn Bhd & Ors [1987] 1 LNS 111 HC* ***(refd)***
Henry v. Geopresco International Ltd [1975] 2 All ER 702 ***(refd)***
Kamal v. State [2007] 4 LRC 800 ***(refd)***
Kanawagi Seperumaniam v. Dato' Abdul Hamid Mohamad [2004] 5 MLJ 495 ***(refd)***
Loh Kooi Choon v. Government Of Malaysia [1975] 1 LNS 90 FC ***(refd)***
Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(refd)***
F *Minister of Home Affairs v. Austin [1987] 1 LRC (Const) 567* ***(refd)***
Mohd Habibullah Mahmood v. Faridah Dato Talib [2004] 1 CLJ (ISL) 91 SC ***(refd)***
Mohd Nordin Johan v. The Attorney-General, Malaysia [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 FC ***(refd)***
Namwandu v. Attorney General [1972] EA 108 ***(refd)***
G *Petaling Tin Bhd v. Lee Kian Chan & Ors [1994] 2 CLJ 346 SC* ***(refd)***
Phang Chin Hock v. PP [1979] 1 LNS 67 FC ***(refd)***
R (Miller) v. Prime Minister [2019] 3 WLR 589 ***(refd)***
R (On The Application Of Privacy International) v. Investigatory Powers Tribunal And Others [2019] UKSC 22 ***(refd)***
Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals
H *[2021] 4 CLJ 1 FC* ***(refd)***
Southern Highlands Provincial Government v. Somare and Others [2008] 2 LRC 373 ***(refd)***
Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***
Teh Cheng Poh v. PP [1978] 1 LNS 202 PC ***(refd)***
Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional [2015] 3 AMR 35 ***(refd)***
I *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors [2010] 1 LNS 1390 HC* ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***
YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor [2003] 1 CLJ 210 HC ***(refd)***

Legislation referred to:
Emergency (Essential Powers) Ordinance 2021, ss. 11, 14, 15
Federal Constitution, arts. 4(1), 43, 44, 71, 121(1), 150(1), (2), (3), (6), (8)
Rules of Court 2012, O. 53 r. 3

For the applicant - Gurdial Singh Nijar, Christopher Leong Sau Foo, Razlan Hadri Zulkifli, Abdullah Abdul Rahman, Abraham Au, Danny Soong Hou Ming, Muhammad Hiqmar Danial Hidzir & Nirvan Gopalan Krishnan; M/s Chooi & Company + Cheang & Ariff
For the respondents - Narkunavathy Sundareson, Ahmad Hanir Hambaly, Mazlifah Ayob & Safiyyah Omar; SFCs
Watching brief:
For Malaysian Bar - Steven Thiru, Abdul Rashid Ismail, Gregory Das & Azreen Ahmad Rastom

Reported by Najib Tamby

JUDGMENT

Evrol Mariette Peters JC:

Introduction

[1] The applicant is a member of the Dewan Rakyat for Pasir Gudang and also a member of the State Legislative Assembly of Johor. This was his application for leave for judicial review ("this application"), for the following reliefs:

(i) declarations that ss. 11, 14 and 15 of the Emergency (Essential Powers) Ordinance 2021 ("the Ordinance") published in the Federal Government *Gazette* PU(A) 12/2021 on 14 January 2021 are invalid and unconstitutional, and therefore null and void; by virtue of their inconsistency with the provisions of the Federal Constitution;

(ii) a declaration that art. 150(8) of the Federal Constitution is unconstitutional, and therefore null and void and of no legal effect, pursuant to being inconsistent with arts. 4(1) and 121(1) of the Federal Constitution, and as a result null and void and of no legal effect; alternatively, and in any event, that art. 150(8) of the Federal Constitution does not preclude the court from judicially reviewing the exercise of power under the Ordinance;

(iii) a declaration that the respondents are under a constitutional duty pursuant to art. 150(3) of the Federal Constitution to advise the Yang di-Pertuan Agong ("YDPA") to summon the Parliament for the Proclamation of Emergency and Ordinance to be laid before both

Houses of Parliament for all necessary and appropriate resolutions to be passed in accordance with the mandatory provisions of art. 150(3) of the Federal Constitution; and

(iv) orders of *mandamus* either directing the respondents to lay the Proclamation of Emergency dated 11 January 2021 published in the Federal Government *Gazette* PU(A) 7/2021 on 12 January 2021 ("Proclamation of Emergency") and the Ordinance before both Houses of Parliament in accordance with the mandatory provisions of art. 150(3) of the Federal Constitution; or alternatively, to advise the YDPA to summon a meeting of the Parliament, in accordance with the mandatory provisions of art. 150(3) of the Federal Constitution.

The Background Facts

[2] On 11 January 2021, a Proclamation of Emergency was made by the YDPA pursuant to art. 150(1) of the Federal Constitution. This Proclamation of Emergency was made following the presentation of the advice of the Cabinet by the first respondent, the Prime Minister.

[3] On 27 January 2021, the applicant filed an application for judicial review. The Attorney General ("AG") on 4 February 2021 then filed an application in encl. 8 to transfer these proceedings to the Kuala Lumpur High Court. The application to transfer was dismissed, and this court proceeded to hear this application on 30 March 2021, which the AG had objected to, but which was eventually dismissed for the following reasons.

The Applicable Law

[4] The starting point for any application for leave for judicial review is O. 53 r. 3 of the Rules of Court 2012 ("Rules of Court") which reads:

Order 53 – Application for judicial review

Rule 3 – Leave

(1) An application under this Order shall not be made unless leave therefor has been granted in accordance with this rule.

(2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

(4) The Judge may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

(5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

(6) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

(7) The court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.

(8) An application to extend time must be served on all respondents and shall be heard *inter partes*.

[5] It has been established by a plethora of cases including *George John v. Goh Eng Wah Bros Filem Sdn Bhd & Ors* [1987] 1 LNS 111; [1988] 1 MLJ 319; *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor* [2003] 1 CLJ 210; *Mohd Nordin Johan v. The Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271; *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; and *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478, that the court has to adopt a flexible approach at the application for leave stage.

[6] In *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* (*supra*), it was stated by Gopal Sri Ram JCA (as he then was), in the following passage:

> What is the approach the High Court should take when considering an application for leave to issue judicial review? The answer to that question is to be found in the following passage in the speech of Lord Diplock in *IRC v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 643:
>
> > The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.
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> [10] To paraphrase in less elegant language what has been said in these cases, the High Court should not go into the merits of the case at the leave stage. *Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine.* So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg, proceedings in Parliament (see art. 63 of the Federal Constitution).
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> (emphasis added)

[7] Reference was made also to *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478, where the threshold for leave was explained by Suriyadi Halim Omar FCJ, in the following passage:

> Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[8] Although I agree with the applicant that the threshold is not a high one, it is crucial to bear in mind that the court must first be clothed with the jurisdiction to entertain this application.

Contentions, Evaluation, And Findings

Whether The Role Of The AG Was Limited

[9] Both the applicant and the Malaysian Bar (which held a watching brief on this application) submitted that the role of the AG at this stage was limited, and that they did not possess *locus* to object to this application.

[10] I am unable to agree with such contention as I drew guidance from the case of *Kanawagi Seperumaniam v. Dato' Abdul Hamid Mohamad* [2004] 5 MLJ 495, where it was elucidated by Faiza Tamby Chik J:

> 3. As the law on the participation of the AG's Chambers and the respondents are distinct, I will take these two issues separately, starting with the AG's role. When an applicant files an application for leave for a judicial review remedy, he has to serve all the papers on the AG. The service on the AG's Chambers of the applicant's *ex parte* application is mandatory as per RHC, O. 53 r. 3(3) which states:
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> > The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavit.
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> 4. There is a good reason why the applicant is required to serve the cause papers on the AG. The rule is based on the principle that judicial review is a principal tool of 'public law' applicable to 'public' bodies in claims brought before a specialised administrative court. In Malaysia, this administrative court is the High Court in its originating jurisdiction. As public bodies impliedly attract public interest and the guardian of public interest is the AG this provision makes the AG a nominal party in all judicial review applications. *The intention of this rule was to ensure that the AG vets all judicial review applications in order to ascertain if his participation is warranted. Whether the AG elects to appear or not is solely at his discretion.* And if the AG does elect to appear by himself or his representative then the court is bound to give a hearing and thereafter decide the matter. *The court has no jurisdiction not to hear the AG.* However if the AG appears it is for

the AG to show the public element involved in the application and to either support or oppose the application. However, if there is no public element involved, there is no need for the AG to appear and it would be implied that the non-appearance of the AG would mean that the application did not touch issues of public interest. This takes me to the next question as what is the meaning of 'public interest' in order for the AG to intervene. I found one in a US case which defined 'public interest' as:

> ... Public interest ... is that interest shared by all citizens in general and by the community at large concerning pecuniary or legal liabilities.
>
> (emphasis added)

[11] I also found instructive the following comments by Varghese George Varughese JCA in *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] 3 AMR 35, in the following passage:

> [34] This then brings me to the significance of the Honourable Attorney-General's input at the leave stage of a judicial review application. It is trite that the "leave" proceedings are intended to sieve out unwanted or frivolous applications before it moves to the substantive stage of proceedings. The assistance required by the court from the Attorney-General's Chambers at this stage, in that context, was to appraise the court of any particular features of the case that would disqualify any leave being granted to the applicant concerned ...
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> ...
>
> [36] The role of the Honourable Attorney-General's Chambers at the leave stage was therefore only to bring to the court's attention any features surrounding that particular complaint that need to be taken into consideration by the court before the leave applied for was granted or refused.

[12] As such, the involvement of the AG in this application was proper as his presence was to assist the court in determining if there was any aspect of the case that should render a dismissal of this application.

Difference Between Justiciability And Jurisdiction

[13] The applicant, in citing several cases including *R (Miller) v. Prime Minister* [2019] 3 WLR 589; *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] 3 AMR 35; and *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579; [2021] 1 MLJ 750 ("*Maria Chin*"), contended that since the issue in the present case concerned the lawful limits of power, and if such limits had been exceeded, the matter was, therefore, justiciable, and that leave should be granted; alternatively, that justiciability was a matter that should be addressed at the substantive motion of the judicial review, and not at this stage.

[14] At this juncture, it is crucial to distinguish between jurisdiction and justiciability. Although frequently used interchangeably, "jurisdiction" is conferred upon a court by law, whereas "justiciability" is concerned with the appropriateness of the matter to be determined. In the Supreme Court case of *Petaling Tin Bhd v. Lee Kian Chan & Ors* [1994] 2 CLJ 346; [1994] 2 AMR 929; [1994] 1 MLJ 657, Edgar Joseph Jr SCJ had remarked in the following passage:

> ... the term refers to real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character. *Guimarin & Doan, Inc v. Georgetown Textile & Mfg Co* 249 SC 561, 155 SE 2d 618, 621".
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> To take the point further, the concept of justiciability requires consideration of the subject matter of the question at issue, the manner of its presentation and the appropriateness of judicial adjudication in the light of these factors. Appropriateness in this context may be determined according to both institutional and constitutional standards which in turn require consideration of both the adequacy of judicial machinery for the task as well as the legitimacy of using it.

[15] I drew guidance from the case of *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2010] 1 LNS 1390; [2011] 1 MLJ 128, where the meaning of "justiciability" was explained by Mohamad Ariff Md Yusof J (as he then was), in the following passage:

> Justiciability relates to the sixth ground stated above - whether judicial review is an appropriate procedure. It can be subsumed even under grounds (v) and (iv). The issue can also be stated as whether the subject matter is "amenable to judicial process", a phrase which appears in the House of Lords decision in *CCSU v. Minister for the Civil Service* [1984] 3 All ER 71, per Lord Roskil. Generally, an issue is regarded as non-justiciable where a court of law or the court process is ill-suited to decide the issue by reason of lack of competence, unsuitability of the legal method, lack of satisfactory criteria for a judicial determination of the dispute at hand, or where constitutional, common or statutory laws expressly or contextually insulate it from judicial determination.
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> ...
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> A good definition of "justiciability" can also be found in Chris Finn, "*The Concept of 'Justiciability' in Administrative Law*" in Groves & Lee, Australian Administrative Law (2007):
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> > The term "justiciability" refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the

> respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a court which feels that its resolution either is beyond the institutional competence of the court or would involve stepping outside its appropriate constitutional role. (at p. 143).

[16] Reference was made also to *Fung Fon Chen & Anor v. The Government Of Malaysia & Anor* [2012] 8 CLJ 706; [2012] 6 AMR 397; [2012] 6 MLJ 724, and *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] 3 AMR 35 on the concept of justiciability, and its difference from jurisdiction.

Implications Of Clauses 6 And 8 of Article 150 Of The Federal Constitution

[17] This application pivoted upon the jurisdiction of the court with regard to the Proclamation of Emergency, in light of cls. 6 and 8 of art. 150 of the Federal Constitution; and in this application, the applicant sought to challenge ss. 11, 14 and 15 of the Ordinance which was promulgated by the YDPA pursuant to art. 150(2) of the Federal Constitution, all of which read:

> Article 150 – Proclamation of Emergency
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> ...
>
> (2) A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event.
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> ***
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> **Emergency (Essential Powers) Ordinance 2021**
>
> Section 11 – Executive and legislative powers
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> For so long as the emergency is in force:
>
> (a) The Prime Minister and the Cabinet existing immediately prior to the issuance of the Proclamation of Emergency on 11 January 2021 who have been conferred the executive functions shall continue to exercise the executive authority of the Federation and such other persons who have been conferred the executive functions by law shall continue to exercise such functions;
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> (b) The Menteri Besar or Chief Minister and the State Executive Council or State Cabinet of the respective States existing immediately prior to the issuance of the Proclamation of Emergency on 11 January 2021 who have been conferred the executive functions shall continue to exercise the executive authority of the States and such other persons who have been conferred the executive functions by law shall continue to exercise such functions; and

(c) The legislative functions to make subsidiary legislation under Federal laws and State laws shall continue to be exercised by the persons so authorised by such laws.

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Section 14 – Parliament Sitting

(1) For so long as the emergency is in force:

(a) The provisions relating to the summoning, proroguing and dissolution of Parliament in the Federal Constitution shall not effect; and

(b) The Parliament shall be summoned, prorogued and dissolved on a date as the Yang di-Pertuan Agong thinks appropriate;

(2) Any meeting of the Parliament which has been summoned before the coming into operation of this Ordinance but has not been held is cancelled.

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Section 15 – Sitting of State Legislative Assembly

(1) For so long as the emergency is in force:

(a) the provisions relating to the summoning, proroguing and dissolution of a State Legislative Assembly in the Eighth Schedule to the Federal Constitution, Constitution of any State and any State law shall not have effect; and

(b) a State Legislative Assembly shall be summoned, prorogued and dissolved on a date as the Yang di-Pertuan Agong thinks appropriate after consultation with the respective Ruler or the Yang di-Pertua Negeri.

(2) Any meeting of a State Legislative Assembly which has been summoned before the coming into operation of this Ordinance but has not been held is cancelled.

[18] However, as alluded to above, the issue that first had to be determined was whether this court had jurisdiction with regard to this application, and to address that, reference was made to art. 150 of the Federal Constitution, in particular cls. 6 and 8 which read:

Article 150 – Proclamation of Emergency

...

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

...

(8) Notwithstanding anything in this Constitution:

(a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and

(b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of:

(i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);

(ii) the continued operation of such Proclamation;

(iii) any ordinance promulgated under Clause (2B); or

(iv) the continuation in force of any such ordinance.

[19] At this juncture, it is fundamental to note that in art. 150(6) of the Federal Constitution, it is stated that no legislation enacted pursuant to a Proclamation of Emergency shall be invalid on the ground of inconsistency with any provision of this Constitution. Clause 6 is clear and was explained in the ruling of Wylie CJ (Borneo) in *Eng Keock Cheng v. PP* [1965] 1 LNS 36, in the following passage:

> The court was referred to a number of Indian cases dealing with the question of excessive delegation of the legislative function under a written Constitution which confers authority to exercise that function on a legislature established under that Constitution. It does not appear that, in any of the cases cited, the legislation that was challenged, was enacted pursuant to a power such as that conferred by cl. (6) of art. 150. *If the legislation is enacted under a power which gives it validity notwithstanding any inconsistency with the Constitution, it becomes unnecessary to consider whether the legislation would, apart from the exercise of that power, be inconsistent with any part of that Constitution*. Consequently, these authorities do not assist in determining the fundamental issue involved in considering this part of the argument.
>
> *The true effect of art. 150 is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved*. This necessarily includes authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution.
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> (emphasis added)

[20] Both the applicant and the AG had submitted extensively on the implications of the ouster provision in cl. 8 of art. 150 of the Federal Constitution, and to support their respective arguments, they relied on several cases including *Maria Chin* and *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals* [2021] 4 CLJ 1 ("*Rovin Joty*").

My interpretation of the cases of *Maria Chin* and *Rovin Joty* is that ouster clauses are not *per se* or automatically invalid for being unconstitutional, and that art. 121 of the Federal Constitution expressly empowers Parliament to prescribe the extent of limits of the court's powers and jurisdiction. As such, it was within the competence of Parliament to legislate, pursuant to the powers conferred on it by art. 121 of the Federal Constitution, which reads:

> Article 121 – Judicial power of the Federation
>
> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:
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> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
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> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
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> (c) (Repealed),
>
> and such inferior courts as may be provided by federal law and **the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law**.
>
> (1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.
>
> (1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the court and appealable under federal law to a judge of the court); and
>
> (b) such other jurisdiction as may be conferred by or under federal law.
>
> (2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Federal Court shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;
>
> (b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and

(c) such other jurisdiction as may be conferred by or under federal law.

(3) Subject to any limitations imposed by or under federal law, any order, decree, judgment or process of the courts referred to in Clause (1) or of any judge thereof shall (so far as its nature permits) have full force and effect according to its tenor throughout the Federation, and may be executed or enforced in any part of the Federation accordingly; and federal law may provide for courts in one part of the Federation or their officers to act in aid of courts in another part.

(4) In determining where the principal registry of the High Court in Sabah and Sarawak is to be, the Yang di-Pertuan Agong shall act on the advice of the Prime Minister, who shall consult the Chief Ministers of the States of Sabah and Sarawak and the Chief Judge of the High Court.

(emphasis added)

[21] It was also stated in *Maria Chin*'s case, relying on the UK Supreme Court decision of *R (On The Application Of Privacy International) v. Investigatory Powers Tribunal And Others* [2019] UKSC 22, that judicial review can be excluded by "the most clear and explicit words". In my view, art. 150(8) of the Federal Constitution is clearer than crystal, as it states that "no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity ...". The words are explicit enough to exclude even an application for leave for judicial review, such as this.

[22] What also needs to be underscored in this application is that in both *Maria Chin* and *Rovin Joty*, the Federal Court was dealing respectively with provisions in the Immigration Act 1959/63 and the Prevention of Crime Act 1959. In this case, the ouster clause was in the Federal Constitution itself, namely art. 150. Therefore, if ousting or restricting judicial review in federal law is not invalid *per se*, *a fortiori* a provision in the Federal Constitution which explicitly excludes the jurisdiction of the court is not invalid. In fact, art. 150(8) of the Federal Constitution appears to provide a double bar to judicial scrutiny, as it is prefaced with the words: "Notwitstanding anything in this Constitution", which is indicative that art. 150(8) not only prevails over any other law, it also supersedes any other provision in the Federal Constitution. As such, art. 150(8) overrides not only art. 121, but arts. 43, 44 and 71 as well, provisions which the applicant contended are inconsistent with art. 150 of the Federal Constitution.

[23] I drew guidance from the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457, speaking through Haidar Mohd Noor FCJ, in the following passage:

Here we are dealing with the law that was promulgated under special provisions of Part XI of the Constitution, which is, art. 150 (the proclamation of emergency). *It should be noted that there is the overriding provision in cl. (8)(b) of art. 150 itself that "notwithstanding anything in this Constitution" the court shall have no jurisdiction to entertain or determine any application in whatever form, on any ground, regarding the validity of, inter alia, the continuation in force of the Ordinanc*e.

(emphasis added)

[24] The applicant also contended that art. 150 of the Federal Constitution was unconstitutional as it was inconsistent with art. 4 which reads:

Article 4 – Supreme law of the Federation

(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

(2) The validity of any law shall not be questioned on the ground that:

(a) it imposes restrictions on the right mentioned in Article 9(2) but does not relate to the matters mentioned therein; or

(b) it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or:

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[25] At this juncture, it is crucial to appreciate that the meaning of "law" in art. 4 is confined to ordinary laws and does not apply to Acts enacted to amend the Federal Constitution. This was clarified in several cases including *Maria Chin*; *Phang Chin Hock v. PP* [1979] 1 LNS 67; [1980] 1 MLJ 70, *Mohd*

Habibullah Mahmood v. Faridah Dato Talib [2004] 1 CLJ (ISL) 91*;* [1992] 2 MLJ 793; *Loh Kooi Choon v. Government Of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187; and *Rovin Joty*.

[26] Bearing in mind that cl. 8 was incorporated into art. 150 of the Federal Constitution in 1981 *vide* Constitution (Amendment) Act 1981 (Act A514), it is evident that the applicant's contention was untenable. In fact, the purpose for the introduction of cl. (8), is provided in the following explanatory note to the Constitution (Amendment) Bill:

> The new Clause (8) seeks to provide that the satisfaction of the Yang di-Pertuan Agong under Clause (1) and Clause (2B) is **final and conclusive, and cannot be challenged or called in question in any court or on any ground**. This Clause also provides that **no court shall have jurisdiction** in relation to the validity of a Proclamation issued under Clause (1) or any declaration made in such Proclamation, or the continued operation of such Proclamation, or in relation to any ordinance promulgated under clause (2B) or the continuation in any such ordinance.
>
> (emphasis added)

[27] The rationale for the introduction of cl. 8 into art. 150 of the Federal Constitution is clear, and that its *raison d'etre* was the case of *Teh Cheng Poh v. PP* [1978] 1 LNS 202, where it was suggested by Lord Diplock, in the following passage, that a Proclamation of Emergency announced by the YDPA was reviewable by the court, as it is, in fact, the decision of the Cabinet:

> This, however, does not mean, as the appellant would have it, that the Security Area Proclamation can be treated by the court as having lapsed *ipso facto* as soon as there are no longer any grounds for considering it still to be necessary for the particular purpose described in s. 47 for which it was originally made. Apart from annulment by resolutions of both Houses of Parliament it can be brought to an end only by revocation by the Yang di-Pertuan Agong. If he fails to act the court has no power itself to revoke the proclamation in his stead. This, however, does not leave the courts powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise his power of revocation would be an abuse of his discretion. Article 32(1) of the Constitution makes the Yang di-Pertuan Agong immune from any proceedings whatsoever in any court. So *mandamus* to require him to revoke the Proclamation would not lie against him; but since he is required in all executive functions to act in accordance with the advice of the Cabinet, ***mandamus*** **could**, in their Lordships' view, **be sought against the members of the Cabinet requiring them to advise the Yang di-Pertuan Agong to revoke the Proclamation**.
>
> (emphasis added)

[28] In light of the purpose and intent of cl. 8 of art. 150 of the Federal Constitution, it was all the more imperative that this application should be dismissed. It is at this juncture that the role of the judge comes to the

forefront, and the approach that I would subscribe to, in light of the clarity of the provisions, is the technique prescribed by Patrick Devlin in his book, *The Judge*, where he states:

> Should judges be lawmakers, law reformers, and even social reformers? In the exercise of their craft they must be handymen, but I do not think they should aim higher. It is their job to apply the law and they must try to make it fit, but new suits and new fashions should be designed by legislators ... What is the business of a court of law? To make law or to do justice according to law? This question should be given a clean answer. *If the law and justice of the case require the court to give a decision which its members think will not make good law for the future, I think the court should give the just decision and refer the future to a law-making body*.
>
> (emphasis added)

[29] The provisions are clear enough not to warrant any form of judicial activism. "It is the province of the courts to expound the law and the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction": per Roskill LJ in *Henry v. Geopresco International Ltd* [1975] 2 All ER 702.

[30] I have to add that a judge is not appointed to subscribe to the views of the *vox populi*. As such, those who feel aggrieved by any legislation, must address themselves to the Legislature, and not the courts. As aptly expressed by Raja Azlan Shah FJ in *Loh Kooi Choon v. Government Of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187, "they have their remedy at the ballot box".

[31] There was heavy reliance by both the applicant and Malaysian Bar on authorities from the UK such as *R (Miller) v. Prime Minister* [2019] 3 WLR 589, and other Commonwealth jurisdictions including (Lesotho) *All Basotho Convention (ABC) v. Prime Minister* [2020] 4 LRC 466; (Papua New Guinea) *Southern Highlands Provincial Government v. Somare and Others* [2008] 2 LRC 373; (Bangladesh) *Kamal v. State* [2007] 4 LRC 800; (Fiji) *Bavadra v. Attorney General* [1988] LRC (Const) 13; (Zimbabwe) *Minister of Home Affairs v. Austin* [1987] 1 LRC (Const) 567; and (Uganda) *Namwandu v. Attorney General* [1972] EA 108. Although the applicant's submission was thoroughly researched and eloquently articulated by his counsel, I was unable to agree with him, lest I miss the forest for the trees, because in my view, all roads in this application led to the clear wording of cls. 6 and 8 of art. 150 of the Federal Constitution. I also drew guidance from the advice of Raja Azlan Shah FJ in *Loh Kooi Choon v. Government Of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 to tread carefully when dealing with the constitutions of other jurisdictions, in light of our own Federal Constitution. In the following passage, His Lordship remarked:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and **it is in the end the wording of our Constitution itself that is to be**

> **interpreted and applied, and this wording "can never be overridden by the extraneous principles of other Constitutions"** – see *Adegbenro v. Akintola & Anor* [1963] 3 All ER 544, 551. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.
>
> (emphasis added)

[32] Since the impediments in cls. 6 and 8 of art. 150 of the Federal Constitution remained unsurmounted, this court was unable to allow this application as its hands are tied by the Federal Constitution, which is and remains the Kelsenian grundnorm of this country. Pursuant to the pure theory of law advocated by Hans Kelsen, the grundnorm or Constitution, in the present case, demands obedience that is free from any form of social or political consideration (see Hans Kelsen, *General Theory of Norms*).

[33] Much has been said by the applicant about the injustice that would result if the court was to shut the door to this application, which had merely sought leave for judicial review. However, the analogy is this: the door is locked by virtue of art. 150(8) of the Federal Constitution. Even if that door is unlocked, there is no guarantee that the court would automatically open it, and grant leave; but at this point in time, the court is not even in possession of the key, and without that key, the inexorable conclusion is that it would be impossible for the court to open the door.

Conclusion

[34] In the upshot, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of submissions of counsel for all parties, this application was dismissed.